1983

R. Milton Yorgason, Salt Lake County Assessor v. County Board Of Equalization of Salt Lake County, Ex. Rel., Episcopal Management Corp : Brief of Appellant R. Milton Yorgason Salt Lake County Assessor : Brief of Respondent Episcopal Management Corp

IN THE SUPREME COURT OF THE STATE OF UTAH

R. MILTON YORGASON,
Salt Lake County Assessor,

Plaintiff, Appellant,

vs.

COUNTY BOARD OF EQUALIZATION
OF SALT LAKE COUNTY, ex. rel.,
EPISCOPAL MANAGEMENT CORP.,

Defendant, Respondent.

Case No. 18986

BRIEF OF RESPONDENT EPISCOPAL MANAGEMENT CORP.

Appeal from Decision of
The Tax Division of the Third Judicial District Court
Honorable Judge Dean Conder, Presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendant and respondent Episcopal Management Corporation (hereinafter "Respondent"), by and through its attorneys, Fabian & Clendenin, submit the following Brief in response to the Brief on Appeal of plaintiff and appellant.

STATEMENT OF THE CASE

Plaintiff and Appellant (hereinafter "Appellant") caused the real property and improvements located at 650 South 3rd East, Salt Lake City, Salt Lake County to be assessed and taxed, claiming that the property was not eligible for a charitable exemption under Article XIII, § 2 of the Utah Constitution.

LEGAL POSTURE OF THESE PROCEEDINGS

On November 14, 1980, the Salt Lake County Board of Equalization found the property located at 650 South 3rd East in Salt Lake City, known as "St. Mark's Tower," to be exempt from real property tax because it was used exclusively for charitable purposes within the meaning of Article XIII, Section 2 of the Constitution of the State of Utah. Appellant appealed this decision to the Utah State Tax Commission, which held a formal hearing on September 25,

1981. On May 3, 1982 the Tax Commission issued its findings of fact, conclusions of law unanimously affirming the ruling of the Board of Equalization and holding the property to be exempt from taxation under the terms of Article XIII, Section 2. Appellant appealed the Tax Commission's decision to the Third Judicial District Court, Tax Division, Salt Lake County. The parties have stipulated that the decision of this Court shall be effective for tax years 1980, 1981 and 1982.

STATEMENT OF FACTS

The parties have entered into a Stipulation of Facts. Included in the Stipulation is an agreement that the transcript of the formal hearing before the Tax Commission may be used in the disposition of this case. The specific facts reflected in the record are those existent at the date of the formal hearing before the Tax Commission on September 25, 1981, but mutatis mutandis, these facts may be assumed to apply to all three tax years in question.

Appellant's statement of the facts is incomplete for a proper understanding of the issues involved and wholly disregards the many ways in which St. Mark's Tower provides a benefit to the community by meeting important social needs and the contributions made to the project by Respondent. Therefore, a brief recitation of the facts is in order.

Episcopal Management Corporation is a Utah non-profit corporation. Its Articles of Incorporation are attached to the Stipulation of Facts. The Fifth Article recites in specific detail the exclusive charitable purpose of the corporation. It is

stipulated that the actual use to which St. Mark's Tower is being put is consistent and in conformity with these Articles. (R. 39). The corporation has been given tax-exempt status by the Internal Revenue Service (tax exempt No. IC 30-82).

The Bishop of the Episcopal Diocese of Utah is ex officio a member of the Board of Directors. The Board, consisting of seven members, serves without compensation. It meets monthly to make policy decisions. (R. 38).

The corporation acquired certain real property at 650 South 3rd East in Salt Lake City (the legal description is Lot 7, Block 19, Plat A, Salt Lake City Survey) and constructed on it a 10 story building known as "St. Mark's Tower." (R. 34). The Tower was acquired, constructed and operated through funding from the U.S. government under Section 202 of the National Housing Act of 1959 (12 U.S.C. § 1701q et seq.) (R. 36-37). The corporation received a loan from the Department of Housing and Urban Development of $3,638,600, for construction, secured by a mortgage which made Episcopal Management Corporation liable for failure to make the necessary payments. (R. 37).

St. Mark's Tower is managed by Danville Development Corporation, a corporation organized for profit, which receives 7% of the gross rents collected. This arrangement is mandated by HUD regulations, which require that non-profit corporations financed under § 202 of the National Housing Act of 1959 (12 U.S.C. § 1701q et seq.) enter into management contracts. Episcopal Management Corporation's contract with Danville has been approved by HUD. The director of St. Mark's Tower, Ms. Vicki P. Cotterell, has

certification in gerontology and holds a B.A. degree in psychology from Kansas State University. (R. 36). She organizes social programs for the tenants. (R. 38).

The Tower consists of 98 rental units together with a commons room where the social services and recreation activities are offered, a resident manager's apartment, and several offices used by the administration. (R. 36). There are no commercial businesses (such as a restaurant or physician's office) in the building. (R. 36).

To be eligible to reside in the Towers, a tenant must be over 62 years of age or handicapped. No more than 10% of the tenants may be handicapped. (R. 37). As of January, 1981, no tenant may have income in excess of $12,000 per year, if single, or $13,700 per year for a married couple. There is no discrimination or preference based on religion, race or sex. (R. 37). There are at present 102 tenants. The average annual income of residents is $4,600. The highest income is $9,500 and the lowest is $1,900. (Tr. 13 and last page of Exhibit 3 attached thereto). Independent verification of income figures is made. (Tr. 15).

The rent for each unit is established by HUD on the basis of fair market value for equivalent private facilities in the community. As of January, 1981, the rent is $433/month per unit. The tenant pays 25% of his adjusted gross annual income toward rent. The average monthly rent paid by the tenants is $96 per month. (R. 37). The difference between the rent paid by the tenant and the established fair market rent is paid by HUD. The mortgage indebtedness is paid from the proceeds of the tenants' rental

payments and HUD subsidies, as are the operating expenses. Any excess must be applied to reouce the mortgage. (R. 38).

The Episcopal Management Corporation has made, and is continuing to make, substantial contributions toward the complex, in addition to agreeing to become personally liable on the mortgage (as discussed earlier and set forth at R. 37). The corporation's Board of Directors, consisting of seven members, as one of its functions, meets once each month to make policy decisions with regard to the operation of St. Mark's Tower. All Board Members are volunteers and serve without compensation. (R. 38). Approximately 1,250 man hours were spent by volunteers on behalf of the Episcopal Diocese of Utah -- the parent of Episcopal Management Corporation -- in negotiations with HUD that led to the financing agreement between HUD and Episcopal Management Corporation, the selection of the building site, the construction of St. Mark's Tower, and the selection of the managing agent. None of the volunteers were compensated for their time. In addition, approximately $1,500 was incurred in travel expenses, all paid for by the Episcopal Diocese of Utah, and not reimbursed by the Episcopal Management Corporation. (R. 39).

The record also makes clear that St. Mark's Tower provides a great benefit to he community by serving a great social need. The undisputed testimony is that the project saves the State government much more than the roughly $40,000 a year that Salt Lake County would gain in revenues from a tax assessment on the proprty. (Tr. 39-40, 72). Moreover, there are an insufficient number of County-owned facilities for the type of people served by St. Mark's Tower. It is estimated that there are 26,000 people in Salt Lake

County who meet HUD guidelines for housing need, yet there are less than a thousand county units available for these people. (Tr. 67). The public housing authorities view operations such as St. Mark's Tower as a most valuable complement to their program and a benefit to governmental activity in this area. (Tr. 76-68).

Housing operations for the elderly and handicapped are very limited. They may go to buildings that provide single room occupancy ("SRO"). The possible horror of such an option is described by Ms. Cotterell. (Tr. 17-19). They may go to rest homes, where it is undisputed that the cost is substantially greater than the cost per resident at places such as St. Mark's Tower. (R. 38; Tr. 39-40, 72). It is ironic that an estimated 20% of those in more expensive rest homes are there, not because they need rest home care, but because they have no place else to go. (Tr. 50). They may go live with their children, although experience shows that this often leads to severe emotional problems and strains family relations. (Tr. 32). Or they may go to a community such as that which exists at St. Mark's Tower. All of the witnesses called, who are experts in this field, agreed that this latter alternative was by far the most desirable and by far the cheapest alternative for society. The physhic and other advantages of the St. Mark's Tower experience extend the time before more expenseive institutionalization is required. (Tr. 51-53).

ARGUMENT

I. RESPONDENT'S USE OF THE PROPERTY MEETS THE "CHARITABLE PURPOSE" TEST ESTABLISHED BY THIS COURT IN FRIENDSHIP MANOR.

Appellant relies upon Friendship Manor Corp. v. Tax Commission, 487 P.2d 1272 (Utah 1971) to justify taxation of St.

Mark's Tower. Respondent submits that such reliance is totally misplaced, and that the factors which were found to be significant in finding non-exemption in Friendship Manor are the very ones which are not present in the case of St. Mark's Tower.

Friendship Manor involved an apartment building of 228 units. Tenants in the Manor had to meet certain requirements. Eighty percent of them had to be over 62 years old. They must be ambulatory. They must be financially able to pay the rent established and the Manor did not accept tenants if they were not financially able to maintain or pay the expenses and maintain the standard of living which was required. Rents were established so that the total amount collected met all expenses plus amortization of interest and principal on the mortgage. Certain commercial businesses were also allowed to operate in the building. The Utah Supreme Court ruled that under these facts, the Manor should not be exempt from taxation:

> Where the senior citizen is paying for all of the services he receives and the rental of the apartments is not determined by need, but is determined by what is required to retire the principal and interest of the mortgage, together with all upkeep and operation expenses, no charitable purpose is involved. The state does not have the obligation to provide living accommodations to persons well able and willing to pay for their needs.

487 P.2d at 1280.

In so holding, this Court established a test for determining what is a charitable use. If rental payments are insufficient to cover the cost of the complex, and are adjusted to reflect each tenant's ability to pay, then a charitable exemption is available; otherwise, it is not. In the case of St. Mark's Tower,

the resident does not pay the full cost of all the services he receives and the rental paid by each resident is determined by need (i.e. 25% of his total income).

Respondent does not quarrel with the result in Friendship Manor. It establishes sound public policy. Indeed, the very differences between the operation of St. Mark's Tower and Friendship Manor are the very differences this Court has looked to in determining what is a charitable use under the "Friendship Manor test".

Appellant argues that St. Mark's Tower fails the Friendship Manor test, since the "rental actually due" is not based on each tenant's ability to pay. This contention misstates the facts of this case, as the tenants are not required, expected or encouraged to pay anything above 25% of their income for rental. Since Friendship Manor looks solely to whether the tenant is paying a rental based on his ability to pay, the Friendship Manor test is satisfied here.

Appellant also relies on Beerman Foundation, Inc. v. Board of Tax Appeals, 87 N.E. 2d 474 (Ohio 1949), which states that if the tenants of a housing complex are required to pay any rental, the complex's property is not used for charitable purposes. Beerman, however, reflects the minority view; the prevailing view, which has become almost universally accepted in more recent cases, is that the charitable use is not destroyed if the tenants do pay some rent, especially if the amount is adjusted to reflect their ability to pay and is below the market rate -- as is the case here. See, e.g. Fredericka Home v. San Diego County, 221 P.2d 68 (Cal. 1950); 71

Am.Jur.2d State and Local Taxation, § 373 (1973). Utah adopted the majority view in Friendship Manor, which held that a charitable exemption can be available even if tenants are required to pay rent, so long as the rent charged each tenant is adjusted to reflect his or her ability to pay. Friendship Manor, 487 P.2d at 1280. See also Salt Lake County v. Tax Commission ex rel. Laborers Local No. 205, 658 P.2d 1192, 1198-9 (Utah 1983) (Oaks, Chief Justice, concurring).

II. HOUSING FOR ELDERLY AND HANDICAPPED PEOPLE CAN BE A CHARITABLE PURPOSE IF THE FRIENDSHIP MANOR TEST IS SATISFIED.

Appellant also argues that the housing of senior citizens and the handicapped can never constitute a charitable use of property. Among the cases cited by appellant for this proposition is United Presbyterian Association v. Board of County Commissioners, 448 P.2d 967 (Colo. 1975), where the court stated that "the furnishing of homes to older adults is not in itself a charitable purpose." Id. at 975. But the court did not hold that such a use could never be charitable; rather, it held that under the facts of that particular case, there was no charitable use. The court found that there was "material reciprocity between alleged recipients and their alleged donors." Id. at 976. In other words, there was a market-type relationship between the landlord and tenants in which the tenants paid market rents which were not adjusted to reflect the tenant's ability to pay.

The United Presbyterian approach is very similar to that of Friendship Manor. This is not surprising, as Friendship Manor relied heavily on United Presbyterian. Thus, Friendship Manor

establishes that under Utah law a housing complex for elderly and handicapped people is a charitable use if the Friendship Manor test is satisfied, notwithstanding any contrary authority from other states, including two other cases cited by Appellant, Paraclete Manor of Kansas City v. State Tax Commission, 447 S.W.2d 311 (Mo. 1969), and Beerman Foundation Inc. v. Board of Tax Appeals, 87 N.E.2d 474 (Ohio 1949).

III. POSSIBLE FUTURE SALE OF PROPERTY DOES NOT AFFECT ITS EXEMPTION.

Appellant contends that since the Episcopal Diocese of Utah -- the parent of respondent -- may be able to sell the St. Mark's Tower property at some future date for a substantial consideration, the Diocese could benefit from the property, which is therefore not being used exclusively for charitable purposes and hence is ineligible for a charitable exemption. In support of this argument, Appellant cites several cases, all of which are readily distinguishable in that they involve the receipt by a non-profit corporation of income resulting from continuing activities carried out on the property, and not revenues derived by the corporation from the sale of the property.

In Parker v. Quinn, 64 P. 961 (Utah 1901), part of the property in question was rented out by the nonprofit corporate owner, which applied the rental payments to charitable endeavors; this Court held that the charitable exemption was unavailable as to that part of the property, since it was not being used exclusively for charitable purposes. Id. at 962. Similarly, in Malad Second Ward of the Church of Jesus Christ of Latter-Day Saints v. State Tax Commission, 269 P.2d 1077 (Idaho 1954), the court held that land

owned by a nonprofit corporation on which wheat was raised was not being used exclusively for charitable purposes, even though the wheat was distributed to the needy as part of a charitable program; the court equated the harvesting of the wheat with the receipt of income from the property. Id. at 1079.

Appellant has cited no cases in which the possible future sale of property used for charitable purposes, the proceeds of which go to the nonprofit corporate seller, was held to disqualify the property from a charitable deduction. To the best of Respondent's knowledge, there are no such cases. This is not surprising, for two reasons. First, such a doctrine would effectively eliminate the charitable exemption from ad valorem property taxation. So long as the property has any value, a future sale would always be possible and the resulting gain to the potential seller would cause the property to lose its exemption. In the unlikely event that the property is absolutely worthless, it would not need the exemption in order to escape ad valorem taxation, which by definition is levied in proportion to the property's value, Callaway v. City of Overland Park, 508 P.2d 902, 907 (Kansas 1973). Second -- conceding for the moment that respondent's sale of property could at some time affect the property exemption -- Appellant's argument runs afoul of the rule that a mere prospective use of the property does not affect its eligibility for a charitable exemption. This rule is explicitly applied to deny an exemption to property designated by its owners for a charitable use which has not materialized as of the date of the assessment, see, e.g., Society of St. Vincent DePaul, Inc. v. Department of Revenue, 537 P.2d 69 (Oregon 1975), but it is also

tacitly recognized to apply to the whole field of charitable property tax exemptions by all courts, who confine their examination of the property's uses to its past or present uses, not to hypothetical future uses. See. e.g., Friendship Manor, supra; Loyal Order of Moose No. 259 v. County Board of Equalization of Salt Lake County, 657 P.2d 257 (Utah 1982). If Appellant believes that a future sale of the property should result in a tax assessment, he should raise this issue at the time of the sale, not at the present time.

IV. ST. MARK'S TOWER COMPLIES WITH THE RELEVANT STATUTORY GUIDELINES.

Utah Code Annotated § 59-2-30 (1974) provides a statutory clarification of the constitutional exemption:

> Property Used for Religious Worship or Charitable Purposes - Requirements for Exemption. This section is intended to clarify the scope of exemptions for property used exclusively for either religious worship or charitable purposes provided for in section 2 of Article XIII of the Constitution of the state of Utah. This section is not intended to expand or limit the scope of such exemptions. Any property whose use is dedicated to religious worship or charitable purposes including property which is incidental to and reasonably necessary for the accomplishment of such religious worship or charitable purposes, intended to benefit an indifinite number of persons is exempt from taxation if all of the following requirements are met:
>
> (1) The user is not organized to produce a profit from the use of the property.
>
> (2) No part of any net earnings, from the use of the property, inures to the benefit of any private shareholder or individual, but any net earnings shall be used directly or indirectly, for the charitable or religious purposes of the organization.
>
> (3) The property is not used or operated by the organization or other person so as to benefit any officer, trustee, director, shareholder, lessor, member, employee, contributor, or any other person through the distribution of profits, payment of excessive charges or compensations.

(4) Upon the liquidation, dissolution, or abandonment of the user no part of any proceeds derived from such use will inure to the benefit of any private person.

The Episcopal Management Corporation in its ownership and operation of St. Mark's Tower complies fully with all of the requirements of this statute. Thus:

(1) Episcopal Management Corporation is not organized to produce a profit from the use of the property.

(2) No part of any net earnings from the use of St. Mark's Tower inures to the benefit of any private shareholder, individual, but any net earnings are used directly or indirectly for the charitable purposes of the Episcopal Management Corporation.

(3) St. Mark's Tower is not used or operated by Episcopal Management Corporation or any other person so as to benefit any officer, trustee, director, shareholder, lessor, member, employee, contributor, or any other person through the distribution of profits, payment of excessive charges of compensations.

(4) Upon the liquidation, dissolution, or abandonment of Episcopal Management Corporation, no part of any proceeds derived from such use will inure to the benefit of any private person.

V. AN EXEMPTION SHOULD NOT BE DENIED BECAUSE THE CHARITABLE ACTIVITES ARE GOVERNMENT SUPPORTED.

Appellant further contends that Respondent's use of the property is not "charitable" under Article XIII, § 2 of the Utah Constitution because Respondent has not contributed anything of

value to the complex, as it is being paid for by funds from the Federal Government and from the tenants of the project. This "source of funds" argument is flawed for two reasons. First, considerations of the source of funding for charitable projects are not relevant in determining whether an exemption exists. Second, the record in this case shows that Respondent has made substantial contributions to the complex.

A. Source of Funds Irrelevant.

Even if the facts of this case showed that St. Mark's Tower is entirely funded by its tenants and by the Federal Government, the complex would still be entitled to a charitable exemption. The only seemingly contrary Utah authority came in Salt Lake County v. Tax Commission ex rel. Laborers Local No. 295, 658 P.2d 1192 (Utah 1983), a case not even cited by Appellant. In that case, this Court, without any discussion of the issue, stated that an apprenticeship program conducted by a group of labor unions "cannot be classified as charitable because it is entirely funded through a combination of federal grants and tuition paid by the apprentices themselves, rather than through the union or its members." Id. at 1194.

Neither this Court nor the petitioners in that case -- who had urged the court to accept this principle -- provided any citations for this statement, and the respondent did not even deal with the issue in its brief. Moreover, the statement is clearly dictum, as the court went on to hold that an exemption was inapplicable because the activities conducted on the property --

including the apprenticeship program -- were "rendered primarily on behalf of union members and their families." Id. The underlying basis of this Court's decision was that the primary reason for the union's existence was to benefit its own members, a limited, self-defined group. Episcopal Management's sole purpose is to benefit the elderly, a category into which all people will fall if they live long enough.

The failure of the part of Laborers Local to fully discuss the "source of funds" issue is made more remarkable by the fact that its statement goes against the established doctrine in Utah that the use of the property is exclusively determinative. As this Court said in Friendship Manor:

> It is the use to which it puts its real property which is the determination of whether or not such property is exempt.

487 P.2d at 1276 (emphasis supplied). In subsequent exemption cases, this Court has looked solely to the use of the property and not to the source of funds. See, e.g., Eyring Research Institute v. Tax Commission, 598 P.2d 1348 (Utah 1979); Baker v. One Piece of Improved Real Property, 570 P.2d 1028 (Utah 1977).

The idea that the existence of a gift can be negated by the presence of government funds was rejected by Chief Justice Oaks in his concurring opinion in Laborers Local:

> A gift or sacrifice for the welfare of the community can be identified . . . from a substantial imbalance in the exchanges between the charitable organization and recipient (i.e. the absence of reciprocity) . . .

658 P.2d at 1198. The "absence of reciprocity" is the Friendship Manor use test. Thus, as Chief Justice Oaks recognized, so long as

there is a charitable use, a gift element is present, regardless of the source of funds.

The lower court in this case also refused to look beyond the use to the source of funds in holding for an exemption:

> . . . the tenants who are in need of charitable assistance are receiving it in this housing. To look to the source of funds to try to determine whether or not the activity is "charitable" would create untold mischief. What would you do about the Red Cross, Salvation Army, etc.?

Yorgason v. County Board of Equalization, Civil No. C 82-4002 at p. 2 (Third Judicial District, December 14, 1982).

The weight of authority from other states which have expressly and fully considered the "source of funds" argument goes against Appellant's contention. In Franciscan Tertiary Province v. State Tax Commission, 566 S.W.2d 213 (Mo. 1978), the court overruled several earlier cases to hold that a housing project used for charitable purposes does not lose its charitable exemption if the funds for the project come solely from the government. Id. at 226. While the housing project in Franciscan was supported by a combination of federal funds and contributions from the nonprofit corporate owner, the court expressly reaffirmed its earlier holding in Bader Realty & Investment Co. v. St. Louis Housing Authority, 217 S.W.2d 489 (Mo. 1949), which permitted a tax exemption for a housing project whose funds came solely from government sources. Franciscan, 566 S.W.2d at 226.

Like the lower court in this case, the Franciscan court rejected the "source of funds" argument because it realized that the argument could be applied to any charity, such as the Red Cross or United Way, that obtains its funding from outside sources.

Franciscan also refused to create a special "source of funds" theory for government grants, because a government grant has the same effect as a contribution from a private source:

> Loaning money to finance these homes for the aged at interest well below market rates, or providing for interest or rent subsidies, does constitute a subsidy or contribution comparable to charitable contributions from individuals or corporations. They have the same effect.

566 S.W.2d at 22.

Franciscan is particularly apposite to this case because it involved a housing project almost identical to St. Mark's Tower, and because it construed a statute almost identical to Article XIII, § 2 of the Utah Constitution. The statute there provided for an exemption for property "used exclusively . . . for purposes purely charitable", while the Utah Constitution's exemption is for property "used exclusively for charitable purposes." Of the Missouri statute, Franciscan said:

> The statute clearly makes the use of the property the focus of the exemption . . . [the] relevance [of other factors] is strictly confined to the extent which they may indicate the purpose for which the property is used and whether such purpose is charitable.

566 S.W.2d at 223. The court continued:

> Furthermore, we cannot believe that it is the intent of the people under [the statute] to withhold the financial assistance of a tax exemption until such time as our elderly are totally incapable of providing for themselves. The whole thrust of [such] projects . . . is to assist its tenants in avoiding such status by providing an atmosphere where they can remain self-sustaining as long as possible. The payment of monthly rent at [such] projects may be for some as important as the other valuable activities. Although federal or other assistance is obviously being provided, the sense of paying one's own way can be an important intangible which reaffirms continued utility and dignity.

566 S.W.2d at 226.

Since Franciscan involved similar statutory language and an almost identical housing complex, these comments are equally applicable to the present case and provide a highly persuasive rationale for an exemption here.

The non-Utah cases cited by Appellant in support of its "source of funds" argument are not on point. Lutheran Home, Inc. v. Board of County Commissioners, 505 P.2d 1118 (Kansas 1973), involved a nursing home where half of the tenants paid their rent out of their own funds and the remaining tenants' rental was paid out of welfare funds. Id. at 1121. The court noted that the property owner expected to be paid -- from whatever source -- the full market rental for each tenant. Id. at 1125. In addition, the court noted that the nursing home was originally operated as a profit-making enterprise which became insolvent and was reorganized into a nonprofit corporation, which operated the nursing home in essentially the same manner as did its predecessor. The non-profit corporation did not even have the word "charity" in its articles of incorporation. Id. at 1124-25. The unmistakable conclusion is that the court decided against an exemption largely to thwart a reorganization of a for-profit business into a nonprofit corporation for the sole purpose of reducing its tax burden. No such situation occurred here; St. Mark's Tower was conceived as, and has always operated as, a nonprofit venture. Moreover, Lutheran Home's use of the property was not exclusively charitable -- a requirement for an exemption under the Kansas Constitution -- as there were no financial need requirements and about half of the tenants were able to pay their rent without any governmental assistance. Id. at

1121. Here, however, all of the tenants are needy, so the property is being used exclusively for the charitable purpose of providing housing for low-income individuals.

Appellant also cites Paraclete Manor of Kansas City v. State Tax Commission, 447 S.W.2d 311 (Mo. 1969), as authority for its argument on this point. However, Paraclete's requirement that the charitable use not be wholly supported by government funds was expressly overruled by Franciscan, supra, 566 S.W.2d at 224-6.

The remaining out-of-state cases cited by respondent are wholly irrelevant to this issue since they involve questions of the charitable use of the property, not the source of funds. In Dow City Senior Citizens Housing Inc. v. Board of Review of Crawford County, 230 N.W.2d 497 (Iowa 1975), the court held that there was no charitable use of the property because the rent charged to the tenants was at the market rate and was not adjusted by need. Id. at 499. The court did mention the fact that the project received government assistance, but this was not a factor in its decision; it merely held that since the property was not being used for charitable purposes, the taxpayers should not be required to provide an "exemption subsidy" in addition to the direct government payments made to the project. Id. A similar rationale was the basis for County of Douglas v. OEA Senior Citizens, Inc., 111 N.W.2d 719 (Nebraska 1961), where the court held that "the furnishing of low-cost housing at its real cost" is not a charitable use. Id. at 725. Since Respondent does not require its tenants to pay a rent equivalent to either the market rate or the cost of the project, but rather adjusts the rent to reflect each tenant's ability to pay,

neither Dow City nor Douglas prevents a charitable exemption here. Finally, Hilltop Village v. Kerville Independent School District, 487 S.W.2d 167 (Texas Civ. App. 1972), which held that a nursing home that adjusted its rental charges to reflect each tenant's ability to pay was not using the property for charitable purposes, id. at 169, is directly contrary to the holding of this court in Friendship Manor, whose exemption criteria are satisfied here, for reasons previously discussed.

B. Respondent Has Contributed to St. Mark's Tower.

Assuming arguendo that a contribution by Respondent to St. Mark's Tower would be necessary to sustain a charitable exemption under Utah law, such an exemption would be available, since Respondent has made substantial contributions of both money and services to the complex. These contributions, as described in the record, have been almost totally ignored by Appellant in his summary of the facts. The money needed to build the complex was not donated to Respondent by the Department of Housing and Urban Development; it was lent to Respondent by HUD under an agreement which makes Respondent liable if it does not repay all amounts due.

The record below also indicates that for the project to become a reality, approximately 1250 manhours were spent by volunteers on behalf of Respondent and its parent, the Episcopal Diocese of Utah, in the negotiation of the loan agreement with HUD, the selection of the building site, the construction of the complex, and the selection of the managing agent; none of the volunteers were compensated for any of this time. In addition, the Episcopal

Diocese incurred approximately $1500 in travel expenses for these endeavors, none of which was reimbursed by Respondent.

Besides its sizable contributions in establishing St. Mark's Tower, Respondent makes substantial contributions to insure the project's continued operation. Respondent's Board of Directors meets monthly to make the policy decisions necessary for the projects continued successful operation. Again, these individuals volunteer their services.

Thus, the record in this case demonstrates that Respondent is not acting as a mere passive conduit for funds given it by the federal government, as Appellant would have this Court believe. In fact, Respondent has incurred substantial monetary obligations, and has generously donated its services to bring about the creation and continued operation of St. Mark's Tower, a commitment consisting of "the generous giving of one's talents and goods to those in need thereof" that is the essence of charity. United Presbyterian, 448 P.2d at 975. While Respondent does not wish to denigrate the contributions made by others, it respectfully submits that St. Mark's Tower would not be in existence today without the contributions made by Respondent.

VI. RESPONDENT'S ACTIVITIES BENEFIT THE COMMUNITY.

Under Utah law, for an activity to be "charitable," it must provide a benefit to the community by serving a social need. Charity has been defined as "activities . . . rendered for the general improvement and betterment of mankind . . . [which] benefit the community as a whole or an unascertainable and indefinite portion thereof." B.P.O.E. No. 85 v. Tax Commission, 536 P.2d 1214,

1216 (Utah 1975), quoted with approval in Laborers Local, 658 P.2d at 1194.

Appellant, citing Salt Lake Lodge No. 85 B.P.O.E. v. Groesbeck, 120 P. 192, 194 (Utah 1911), argues that the only type of benefit to the community which may support an exemption is one which reduces governmental expenditures. Yet a careful reading of Groesbeck reveals that this Court required such a quid pro quo not for a use to be "charitable," but only for a loose construction of the exemption on the issue of whether the property was being used exclusively for charitable purposes, i.e. whether an exemption could survive if the property was used for both charitable and non-charitable purposes. Id. at 193-4. Since there has been no "mixed use" issue raised in this case -- the only use issue being whether the sole use of the property is charitable -- the Groesbeck test is not relevant here. In addition, it should be noted that Groesbeck was overruled by Loyal Order of Moose No. 259 v. County Board of Equalization, 657 P.2d 257 (Utah 1982), beginning January 1, 1983.

A broader meaning of charity, one which recognizes that a reduction in governmental expenditures is but one form of a benefit to the community, was given in B.P.O.E. No. 85 v. Tax Commission:

> A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with the existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

536 P.2d at 1216-17.

The record in this case shows clear and uncontradicted evidence of the benefits to the community generated by St. Mark's Tower:

1. The complex saves the state more than the estimated $40,000 annually which would be gained in property tax revenues because many of the residents would otherwise go into nursing homes, where they would be cared for at state expense through the Medicaid program.*

2. Those tenants not eligible for Medicaid provided nursing home care would be forced to live alone in single room occupancy "flophouses", where the often unsafe and unsanitary living conditions have a profoundly deleterious effect on the physical and psychological health of their elderly residents. St. Mark's Tower benefits these people by providing them with activities, fellowship and safe, sanitary living conditions. This environment is especially conducive to the physical and mental well-being of the residents. A similar project was held to provide a benefit to the community in Franciscan, where the court noted that the activities "and the continued companionship available for such projects does help prolong life and health by reaffirming the sense that life is worth living, that society cares." 566 S.W.2d at 225.

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* A simple mathematical illustration confirms this. Thus the total estimated average annual income of the 102 tenants is $469,000 (102 x $4600). The cost of nursing home care is estimated at $1,000 per month (Tr. 35), or $1,224,000 for the 102 tenants. As $469,000 would totally exhaust the combined income of these elderly persons the difference of $755,000 would have to be paid from some other segment of society.

3. The type of care provided by St. Mark's Tower is viewed as the most cost effective, i.e. the method that reduces the cost to society as a whole of caring for elderly and handicapped people. Were the residents placed in nursing homes, others would be paid to provide them services -- such as bathing and dressing them -- that they are able to perform by themselves, at no cost to society, at St. Mark's Tower. If the residents were living in private apartments scattered throughout the county, extra costs would be incurred in delivering to them health care and other social services. By sparing society as a whole significant expenditures in caring for its residents, St. Mark's Tower is providing the type of benefit to the community that merits a property tax deduction under B.P.O.E. No. 85 and Salt Lake County v. Tax Commission.

Appellant argues that any benefit leading to a reduction in state government expenditures -- specifically, Medicaid -- should be ignored in determining the benefit to the community, because the tax here was assessed not by the state, but by Salt Lake County. This position finds no support in Article XIII, § 2 of the State Constitution, which gives absolutely no indication that a piece of property could be exempt from state taxation yet subject to county taxation, or vice versa. There is also no indication that eligibility for an exemption could depend on the allocation of social service responsibilities between the state and its counties. Furthermore, this contention overlooks the fact that a county's taxing power is derived solely from the state legislature; if property is deemed to be used for charitable purposes because it

reduces state expenditures or otherwise benefits the community, the state is prohibited from taxing it under Article XIII, § 2, and the state cannot circumvent the prohibition by authorizing a county to tax the property; since the county derives its taxing power solely from the state under Article XIII, § 5 and Utah Code Ann. § 17-4-3[5], any tax that the state cannot assess cannot be assessed by a county.

That the community benefits greatly from housing for the elderly and handicapped is recognized by many Federal and State statutes, which have expressed a strong public policy in favor of the type of housing provided by St. Mark's Tower. The Utah State Legislature, in the Public Welfare portion of the Utah Code, § 55-18-1 (1974), stated:

> It is declared to be the policy of the state of Utah to promote the general welfare of its citizens that it is necessary to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural areas. These conditions cause an increase and spread of disease and crime, and constitute a menace to the health, safety, morals and welfare of the state. It is the policy of the state of Utah to make adequate provision of housing for persons of low income, for elderly persons of low income, for handicapped persons of low income, for vetrans of low income unable to provide themselves with decent housing on the basis of benefits available to them through certain government guarantees of loans available to them through certain government guarantees of loans for purchase of residential property, and during lmited periods, housing for disaster victims. The provision of safe and sanitary dwelling accommodations at rents or prices which persons of low income can afford will materially assist in developing more desirable neighborhoods and alleviating the effects of poverty in this state. The purposes of this act are t meet these problems by providing low-cost housing for low-income persons and to encourage cooperation between political subdivisions thereby making available low-cost housing facilities in all areas of the state. It is in the public interest to utilize the board financial resources and technical services available to government in cooperation with the ingenuity and expertise of private enterprise to alleviate this

lack of safe and sanitary dwellings while stimulating local industry.

It should be noted that such statement of policy not only applies to actions by government, but that this shall be done "in cooperation with the ingenuity and expertise of private enterprise."

Congress articulated a similar purpose when it passed the National Housing Act:

> The Congress finds that there is a large and growing need for suitable housing for older people both in urban and rural areas. Our older citizens face special problems in meeting their housing needs because of the prevalence of modest and limited incomes among the elderly, their difficulty in obtaining liberal long-term home mortgage credit, and their need for housing planned and designed to include features necessary to the safety and convenience of the occupants in a suitable neighborhood environment. The Congress further finds that the present programs for housing the elderly under the Department of Housing and Urban Development have proven the value of Federal credit assistance in this field and at the same time demonstrated the urgent need for an expanded and more comprehensive effort to meet our responsibilities to our senior citizens.

12 U.S.C.A. § 1701r (1980).

Congress reaffirmed these purposes in the Low-Income Housing Act:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, inconsistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. . . .

42 U.S.C.A 1437 (Supp. 1982).

A report to the Special Committee on Aging of the United States Senate in 1978 stated:

> Out-of-reach housing expenses are not the only problem. There is also widespread and growing unavailability of shelters suited to varying housing needs of entire groups of elderly persons. For example, a recent report issued by this committee described the needs of frail and impaired older persons and estimated that upwards of 200,000, such individuals would annually choose to reside in congregate housing if it were available, offering meal service, housekeeping aid, personal assistance, and other services necessary to maintain independence and dignity.
>
> The need for such service-supplemented shelter will continue to increase;new estimates just obtained by the committee indicate that, between now and the year 2000, the "graying" of the population will accelerate; the percentage of older persons more than 75 years of age will increase from 38 percent to 45 percent of the total post-65 population. Without new housing resources, such persons will probably be forced into costly and premature institutionalization in nursing homes, hospitals, and other medical facilities. Legislation now in preparation would expand the availability of congregate services within federally assisted housing programs.
>
> This information paper describes another group of older Americans. They have been described as "the invisible elderly" and they reside alone in single-room occupancy (SRO) hotels which are generally located in decaying and crime-ridden sections of urban America.

Single Room Occupancy; A Need For National Concern, June, 1978, G.P.O. Stock No. 042-070-04542-6, p. iii.

These quotations reflect governmental recognition of our society's desperate need for housing for our low-income elderly. They also show that the lack of such housing puts strains upon other community resources. It is difficult to believe that steps taken to help remedy this need and reduce the strain on other community resources would not be classified as "charitable."

CONCLUSION

The property known as St. Mark's Tower is being used exclusively for charitable purposes under Article XIII, § 2 of the

Constitution of the State of Utah. The decision of the District Court should therefore be affirmed.

DATED this 2nd day of June, 1983.

FABIAN & CLENDENIN,
A Professional Corporation

By 
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